

Worth the Click: Why Greater FTC Enforcement Is Needed to Curtail Deceptive Practices in Influencer Marketing

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WORTH THE CLICK: WHY GREATER FTC ENFORCEMENT
IS NEEDED TO CURTAIL DECEPTIVE PRACTICES IN
INFLUENCER MARKETING

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INTRODUCTION

Rach Parcell founded Pink Peonies in 2010 as a blog to document her first year of marriage.¹ Within three years, what had started as mere hobby had rapidly grown into a full-fledged business.² Today, Parcell has over 16,300 followers on Twitter,³ over 98,000 “likes” on Facebook,⁴ and over 931,000 followers on Instagram.⁵ Parcell leverages the relationship she has built with her loyal followers to generate income from affiliate links, sponsored posts, and her recently launched clothing line.⁶

Parcell is an “influencer.” Broadly defined, an influencer is anyone who has the ability to impact someone’s purchase decisions.⁷ In 2014, Parcell earned over \$960,000 just from sharing affiliate links;⁸ these links are specially coded to enable a brand to credit a consumer’s purchase to an influencer and provide the influencer with a commission based on the sale.⁹ Today, top influencers can make six figures a month, or at least \$1.2 million annually, solely from affiliate links.¹⁰

1. Rach Parcell, *About*, PINK PEONIES, <http://pinkpeonies.com/about/> [https://perma.cc/T4S7-JRZX].

2. *See id.*

3. @rachparcell, TWITTER, <https://twitter.com/rachparcell> [https://perma.cc/9EVZ-E9VA].

4. PinkPeonies (@thepinkpeonies), FACEBOOK, <https://www.facebook.com/thepinkpeonies/> [https://perma.cc/ZU73-BUNS].

5. Rach Parcell (@rachparcell), INSTAGRAM, <https://www.instagram.com/rachparcell/> [https://perma.cc/8T9H-BK3R].

6. *See* Parcell, *supra* note 1; *see also* Rachel Strugatz, *The Blogosphere Pays off More than Ever*, WOMEN’S WEAR DAILY (Jan. 11, 2016), <http://wwd.com/business-news/media/chiara-ferragni-fashion-bloggers-money-make-income-millionaire-kristina-bazan-kylie-jenner-10306124/> [https://perma.cc/8X9P-SQAK].

7. *See Influencers*, BUS. DICTIONARY, <http://www.businessdictionary.com/definition/influencers.html> [https://perma.cc/ATZ3-S9FN].

8. Rachel Strugatz & David Yi, *Top Bloggers’ Incomes Approach New Heights*, WOMEN’S WEAR DAILY, June 12, 2014, at 1, 6.

9. *See* Benjamin Edelman & Wesley Brandi, *Risk, Information, and Incentives in Online Affiliate Marketing*, 52 J. MARKETING RES. 1, 2-3 (2015).

10. Rachel Strugatz, *ShopStyle Banks on Bloggers, Relaunches Influencer Network*, WOMEN’S WEAR DAILY (June 10, 2015), <http://wwd.com/business-news/media/shopstyle-collective-bloggers-10145965/> [https://perma.cc/KYS6-4ZHS].

Like Parcell, most influencers have built their followings by sharing insights and images of their everyday lives.¹¹ Initially, influencers do not receive compensation for their posts; they personally purchase the products they choose to promote.¹² But as an influencer's following grows, so do the opportunities to generate profits from brand "partnerships" and "collaborations," as well as from affiliate links.¹³ These profitable promotional opportunities, regardless of their moniker, are considered endorsements that the Federal Trade Commission (FTC) is empowered to regulate under section 5 of the FTC Act.¹⁴ To protect consumers from deceptive advertising practices, the FTC requires clear and conspicuous disclosure of an endorsement when there is a material relationship between the influencer and the brand that a consumer might not reasonably expect.¹⁵ Without clear and conspicuous disclosures of these material relationships, consumers struggle to determine the nature of the relationship between the influencer and the brand promoted in any given post and to accurately evaluate how much weight to give the influencer's endorsement.¹⁶

The FTC Guides Concerning Use of Endorsements and Testimonials in Advertising (the Guides) establish broad principles that govern endorsement disclosure requirements and provide the FTC's interpretation of how section 5 of the FTC Act applies to the use of endorsements in advertising.¹⁷ Other scholarship in this area champions revisions to the Guides to further clarify when disclosures are required and what constitutes an adequate disclosure.¹⁸ However, revisions are unnecessary because the Guides provide detailed examples that demonstrate how the principles apply to a

11. See BRIAN SOLIS, *THE INFLUENCER MARKETING MANIFESTO: WHY THE FUTURE OF INFLUENCER MARKETING STARTS WITH PEOPLE AND RELATIONSHIPS NOT POPULARITY* 1 (2016).

12. See *id.*

13. See Strugatz, *supra* note 6.

14. See 15 U.S.C. § 45(a)(1)(2) (2012); see also *The FTC's Endorsement Guides: What People Are Asking*, FED. TRADE COMM'N, <https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking> [<https://perma.cc/9ME9-3BZV>].

15. See 16 C.F.R. § 255.5 (2017).

16. See *infra* Part I.C.

17. See 16 C.F.R. § 255.0.

18. See, e.g., Leah W. Feinman, Note, *Celebrity Endorsements in Non-Traditional Advertising: How the FTC Regulations Fail to Keep up with the Kardashians*, 22 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 97, 137-42 (2011).

wide range of endorsement situations.¹⁹ Moreover, the adaptability of the Guides enables their application to endorsements across a variety of new and emerging advertising platforms.²⁰ The FTC has even provided specific guidance confirming that influencers must clearly and conspicuously disclose any endorsement compensated through affiliate links.²¹ Yet, influencers do not disclose, and brands do not require influencers to disclose, these relationships at an alarming rate.²² To date, the FTC's enforcement actions have failed to effectively address the nondisclosure of endorsements in the affiliate marketing industry because the FTC has generally limited its enforcement power to discrete influencer marketing campaigns.²³

Until 2017, the FTC made individual influencers seemingly invincible by declining to pursue enforcement actions against them.²⁴ Moreover, the FTC's few attempts to enforce endorsement disclosure requirements against individual influencers are insignificant in comparison to the number of influencers that face no scrutiny.²⁵ Notably, the FTC still has not pursued action against an individual influencer for failing to properly disclose an endorsement in connection with an affiliate link.²⁶ And the practices of the affiliate networks—which comprise a \$4.5 billion industry²⁷—appear to have escaped scrutiny, as they are entities distinct from any individual marketing campaign or any particular brand.²⁸ Therefore, to effectively protect consumers from deceptive affiliate marketing, the FTC must pursue enforcement actions against individual influencers and affiliate network companies for failing to clearly and

19. *See, e.g.*, 16 C.F.R. § 255.0.

20. *See, e.g., id.*

21. FED. TRADE COMM'N, *supra* note 14.

22. *See infra* Part I.C.

23. *See infra* Part III.B.1.

24. *See infra* Part III.B.1. In 2017 the FTC brought its first complaint against individual influencers for promoting their company in posts on YouTube and Twitter without “disclos[ing] they jointly owned the company.” *See* Press Release, Fed. Trade Comm'n, CSGO Lotto Owners Settle FTC's First-Ever Complaint Against Individual Social Media Influencers (Sept. 7, 2017), <https://www.ftc.gov/news-events/press-releases/2017/09/csgo-lotto-owners-settle-ftcs-first-ever-complaint-against> [<https://perma.cc/9RSM-AS8N>].

25. *See infra* Parts I, IV.

26. *See infra* Part III.B.1.

27. *See* Strugatz, *supra* note 6.

28. *See infra* Part III.B.1.

conspicuously disclose endorsements compensated through affiliate links.

The FTC should leverage consent orders to set the industry standard for clear and conspicuous disclosures of affiliate links and effective influencer endorsement disclosure monitoring programs.²⁹ To protect its enforcement legitimacy, the FTC should avoid pursuing enforcement mechanisms that would result in strict liability for any failure to disclose an endorsement.³⁰ The FTC should also increase its outreach efforts to individual influencers to minimize endorsement disclosure issues with up-and-coming influencers.³¹

Part I of this Note discusses the rise and appeal of influencer marketing, which highlights the importance of enforcing endorsement disclosure requirements to protect consumers from deceptive advertising practices. Part II provides an overview of the FTC's deceptive advertising legal regime, explaining its application to endorsement disclosures in the influencer and affiliate marketing context. Part III explores the FTC's prophylactic mission, enforcement mechanisms, and enforcement discretion by examining how the FTC exercises its enforcement discretion with respect to influencer endorsements and affiliate marketing. Part IV proposes the FTC pursue a multipronged enforcement approach to better protect consumers from influencers who fail to meet affiliate link disclosure requirements. This approach includes pursuing enforcement actions against top influencers and affiliate marketing companies and increasing engagement with the influencer community to improve voluntary compliance with disclosure requirements.

I. INFLUENCER AND AFFILIATE MARKETING

The influencer marketing industry is growing exponentially, and it shows no signs of slowing down. Affiliate marketing, a subset of influencer marketing, enables brands to monitor the return on their investment and reap the benefits of working with influencers to promote their products. Together, the rise and appeal of influencer

29. *See infra* Part IV.C.

30. *See infra* Part IV.D.

31. *See infra* Part IV.E.

marketing highlight the importance of the FTC enforcing endorsement disclosure requirements.

A. *The Rise of Influencer Marketing*

An influencer is anyone “who ha[s] the power to affect purchase decisions of others because of their (real or perceived) authority, knowledge, position, or relationship.”³² This Note specifically focuses on noncelebrity, professional influencers.³³ These are individuals who have developed loyal followings by sharing insights and images from their everyday lives online.³⁴ The FTC defines influencers as endorsers because influencers provide “advertising message[s] ... that consumers are likely to believe reflect[] the opinions, beliefs, findings, or experiences of [the influencer, and not] the sponsoring advertiser.”³⁵

Endorsements from influencers are distinguishable from traditional celebrity endorsements. As ordinary people sharing their everyday lives on social media, influencers are more relatable and their endorsements are seemingly more authentic than endorsements from traditional celebrities.³⁶ An influencer’s endorsement is often equivalent to a peer recommendation and can carry significant weight with her followers.³⁷

This “trusted voice speaking to their personal audience ... is the most effective and organic exposure a brand can get.”³⁸ One study found that 49 percent of consumers rely on influencer recommendations when making purchasing decisions.³⁹ Approximately 40 percent had purchased an item after seeing an influencer endorsement

32. BUS. DICTIONARY, *supra* note 7.

33. Simply referred to as “influencers” throughout this Note.

34. *See* SOLIS, *supra* note 11, at 1.

35. 16 C.F.R. § 255.0(b) (2017).

36. *See* SOLIS, *supra* note 11, at 1.

37. *See id.*; *see also* NIELSEN, GLOBAL TRUST IN ADVERTISING: WINNING STRATEGIES FOR AN EVOLVING MEDIA LANDSCAPE 4 (2015) (“In fact, two-thirds (66%) say they trust consumer opinions posted online—the third-most-trusted format.”).

38. Paresh Dave, *Firms Turn to Online ‘Influencers’ to Spread the Word on Social Media*, L.A. TIMES (Jan. 1, 2015, 4:23 PM), <http://www.latimes.com/business/la-fi-advertising-disrupted-20150102-story.html> [<https://perma.cc/HPR4-RXZB>].

39. Marty Swant, *Twitter Says Users Now Trust Influencers Nearly as Much as Their Friends*, ADWEEK (May 10, 2016), <http://www.adweek.com/news/technology/twitter-says-users-now-trust-influencers-nearly-much-their-friends-171367> [<https://perma.cc/6MN4-6NNK>].

on social media, and 20 percent had shared a product they learned about from an influencer with their own friends and family.⁴⁰ Accordingly, companies are increasingly diverting money from traditional advertising and investing in the power of influencers.⁴¹

Influencers often leverage their followings across multiple social media platforms, including personal blogs, YouTube, Facebook, Instagram, Twitter, and Snapchat.⁴² Influencers post over 200,000 sponsored images every month on Instagram, an image-based social media platform.⁴³ An influencer with three to seven million followers can earn on average \$75,000 per Instagram post.⁴⁴ An influencer with one to five hundred thousand followers can earn on average \$5,000 per Instagram post.⁴⁵ Compensation ranges from \$2,000 to \$300,000 per post depending on the social media platform and the influencer's number of followers.⁴⁶ Accordingly, top influencers have the potential to earn between \$1 million and \$3 million per year simply by sharing products through sponsored posts and affiliate links.⁴⁷ Even influencers with smaller followings can generate income in the high six figures.⁴⁸ This profitability allows many influencers to pursue being an influencer as a full-time job.⁴⁹

However, a large number of followers is not the same thing as influence.⁵⁰ Brands must carefully select influencers that can

40. *Id.*

41. See Dave, *supra* note 38; Christine Moorman, *Social Media Spending Triples but Falls Short of Expectations*, FORBES (Aug. 23, 2016, 9:50 AM), <http://www.forbes.com/sites/christine-moorman/2016/08/23/social-media-spending-triples-but-falls-short-of-expectations/#7bd5ab357cff> [<https://perma.cc/VD3J-UTGJ>].

42. See The Data Team, *Celebrities' Endorsement Earnings on Social Media*, ECONOMIST (Oct. 17, 2016), <http://www.economist.com/blogs/graphicdetail/2016/10/daily-chart-9> [<https://perma.cc/JWT9-JQXN>].

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. Strugatz, *supra* note 6.

48. See Strugatz, *supra* note 10.

49. See *id.*

50. See SOLIS, *supra* note 11, at 4.

convert views, likes, and shares into sales.⁵¹ Further, measuring this conversion and return on investment is often hard to do.⁵²

B. The Appeal of Affiliate Marketing

Affiliate marketing solves the challenge of ensuring a brand's return on investment from sponsored social media posts. Instead of paying a significant fee for a sponsored post that has no guarantee of generating sales, a brand only pays an influencer when the influencer successfully generates a sale.⁵³ The brand provides the influencer with specially coded hyperlinks to share across her social media platforms, and the influencer earns a commission each time a consumer clicks the link shared by the influencer and completes a purchase from the brand.⁵⁴

Some brands manage their affiliate programs in-house, but most brands work with an affiliate network (network)—a company that brings together brands and influencers.⁵⁵ Networks recruit brands and influencers, generate the hyperlinks for influencers to share, track brand and influencer performance, collect payments from brands, and issue consolidated payments from multiple brands to influencers.⁵⁶ Networks also advise influencers on leveraging their followings to maximize profit and direct influencers with regard to permissible practices as a network member.⁵⁷

51. See Yuyu Chen, *Inside the Rocky, Love-Hate Relationship Between Marketers and Influencers*, DIGIDAY (May 9, 2016), <http://digiday.com/brands/inside-rocky-love-hate-relationship-marketers-influencers/> [https://perma.cc/V88Y-EC9J].

52. See *id.*

53. See Edelman & Brandi, *supra* note 9, at 1.

54. See *id.* at 3. When the consumer clicks on the specially coded hyperlink, the link places a “cookie” on the consumer’s computer. *Id.* at 4-5. The cookie enables the brand’s website to recognize that the influencer referred the consumer to the brand through an affiliate link and pay the influencer a commission if the consumer makes a purchase. *Id.* at 3-5.

55. See *id.* at 4. Amazon, eBay, and Apple all manage their affiliate programs in-house. *Id.*

56. See *id.*

57. See *id.*; see also Francesca Mari, *The Click Clique*, TEX. MONTHLY (Sept. 2014), <http://www.texasmonthly.com/articles/the-click-clique/> [https://perma.cc/5RM4-MDTY] (“When one popular rewardStyle blogger became so successful featuring outfits under \$100 that she was suddenly able to incorporate more-expensive clothing, [the network] quickly intervened. ‘All of a sudden, her earnings are going down with us So we had to say, ‘You’re not converting whenever you show the Tibi or the McQueen or whatever else, because your reader is only spending a hundred dollars or less online at any given time. You got rich, but your

For brands and influencers in the fashion, beauty, and lifestyle industries, rewardStyle is one of the premiere affiliate network companies.⁵⁸ In 2014, rewardStyle's network of over 9000 influencers and 4000 retailers generated \$282 million in sales.⁵⁹ Today, rewardStyle's network consists of over one million brands around the world⁶⁰ and has generated over \$1 billion in sales since its founding in 2011.⁶¹

RewardStyle has innovated beyond basic hyperlinks and provides influencers with embeddable widgets containing affiliate links, which enable influencers to add an easily shoppable visual to their blog posts.⁶² The network also developed LIKEtoKNOW.it to monetize Instagram posts for influencers.⁶³ Instagram allows influencers to include the text of a web address in a post caption, but Instagram does not make that text clickable and a consumer cannot quickly use an affiliate link in one step if the consumer wants to purchase a product from an influencer's post.⁶⁴ To circumvent this problem, rewardStyle encourages consumers to sign up for LIKEtoKNOW.it.⁶⁵ When the consumer "likes" an Instagram post that an influencer created according to LIKEtoKNOW.it's specifications, rewardStyle sends the consumer an email containing affiliate links to the products shared in the Instagram post.⁶⁶ As with affiliate links that influencers share on other platforms, LIKEtoKNOW.it minimizes the number of steps a consumer must take to shop the products an influencer has endorsed, while also turning a profit for the influencer, network, and brand. In the first nine months of

readers didn't."").

58. See Mari, *supra* note 57.

59. Elizabeth Holmes, *How Style Bloggers Earn Sales Commissions, One Click at a Time*, WALL ST. J. (Feb. 11, 2015, 11:33 PM), <http://www.wsj.com/articles/how-style-bloggers-earn-sales-commissions-one-click-at-a-time-1423693911> [<https://perma.cc/LRG8-A95N>].

60. REWARDSTYLE, <https://www.rewardstyle.com> [<https://perma.cc/MX5R-NK3C>].

61. Jordan Crook, *RewardStyle Helps Influencers Make Money from Social*, TECHCRUNCH (May 6, 2016), <https://techcrunch.com/2016/05/06/rewardstyle-helps-influencers-make-money-from-social/> [<https://perma.cc/EK7M-AUJ2>].

62. Holmes, *supra* note 59.

63. *Id.*

64. *See id.*

65. *See id.*

66. *Id.*

LIKEtoKNOW.it's operation, rewardStyle generated \$10 million in sales.⁶⁷

For influencers, affiliate links are a significant revenue stream.⁶⁸ This is remarkable because, of the consumers who click on an affiliate link, only 1 or 2 percent make a purchase and only 3 percent of purchases include the exact item from the affiliate link.⁶⁹ Nonetheless, these profits are possible because affiliate links enable influencers to earn a commission on a consumer's *entire* purchase.⁷⁰ Commissions range from 3 to over 20 percent,⁷¹ and rewardStyle's average commission is 13 percent.⁷² A top influencer can generate well over \$1.2 million in annual revenue from affiliate links alone.⁷³ Affiliate marketing is a rapidly growing industry, and experts projected that brands would spend \$4.5 billion on affiliate marketing in 2016.⁷⁴

C. The Importance of Endorsement Enforcement in Influencer Marketing

The FTC requires influencers to disclose any material connection between themselves and a brand that consumers might not reasonably expect.⁷⁵ These disclosures are necessary to ensure consumers can accurately evaluate and give appropriate weight to an influencer's endorsement.⁷⁶ Consumers view influencers as their peers, and will give the same high-level of value to a fashion influencer's opinion as they would to a best friend that goes shopping with them.⁷⁷ A best friend's endorsement of a particular pair of shoes will typically be independent of any material relationship with the brand. In contrast, the employee who assists the consumer in a store clearly has a relationship with the brand. The consumer

67. *Id.*

68. See Strugatz, *supra* note 6.

69. Mari, *supra* note 57.

70. See *id.*

71. Holmes, *supra* note 59.

72. Mari, *supra* note 57.

73. Strugatz, *supra* note 10.

74. Strugatz, *supra* note 6.

75. See 16 C.F.R. § 255.5 (2017).

76. See FED. TRADE COMM'N, *supra* note 14.

77. See *supra* notes 36-37 and accompanying text.

will be wary of placing as much value on the employee's opinion because the consumer knows that the economic benefit that comes from making the sale motivates the employee's endorsement. Without clear and conspicuous disclosures of material relationships, a consumer cannot effectively determine whether an influencer's endorsement should be given the weight of a trusted friend or of a brand's employee.⁷⁸

Despite disclosure requirements, just over half of brands require influencers to disclose material connections,⁷⁹ and one in four influencers report that brands have specifically asked them not to disclose their material connection to the brand.⁸⁰ Market forces alone are unlikely to correct this deceptive advertising practice, because clear and conspicuous disclosures jeopardize the inherent power of influencers by revealing that what a consumer perceives to be a peer recommendation is actually a paid advertisement.⁸¹ Thus, effective FTC enforcement of endorsement disclosure requirements in influencer marketing is critical to preventing consumer deception and enabling consumers to make informed purchasing decisions. Effective enforcement will also benefit brands and influencers, who stand to lose essential credibility when consumers discover the extent of their nondisclosures and feel betrayed by what they once thought was an "authentic and trustworthy" voice.⁸²

II. THE CURRENT DECEPTIVE ADVERTISING LEGAL REGIME AND DISCLOSURE REQUIREMENTS

The FTC's deceptive advertising legal regime applies to endorsement disclosures in the influencer and marketing context. An overview of the FTC's deceptive advertising legal regime provides the

78. See FED. TRADE COMM'N, *supra* note 14.

79. SOLIS, *supra* note 11, at 16.

80. Lindsay Stein, *One in Four Influencers Asked Not to Disclose Paid Promotion*, ADAGE (Aug. 10, 2016), <http://adage.com/article/cmo-strategy/influencers-asked-disclose-arrangement/305389/> [<https://perma.cc/UBH4-7KPP>].

81. See SOLIS, *supra* note 11, at 1.

82. Thomas Harvey, *Marketing Your Brand with Influencers? Make Sure the FTC Hits the "Like" Button*, RECORDER (Sept. 26, 2016, 10:57 AM), <http://www.therecorder.com/id=1202768022029/Marketing-Your-Brand-With-Influencers-Make-Sure-the-FTC-Hits-the-Like-Button?slreturn=20170830173158> [<https://perma.cc/XQL6-Z9WE>].

foundation for understanding the FTC's endorsement disclosure requirements for influencers, brands, and intermediaries.

A. *The FTC's Deceptive Advertising Framework*

Section 5 of the FTC Act empowers the FTC to require influencers disclose affiliate links through its mandate “to *prevent* persons, partnerships, or corporations ... from using ... unfair or *deceptive acts or practices* in or affecting commerce.”⁸³ The FTC Act does not define “deceptive acts or practices.”⁸⁴ Thus, the FTC has issued a policy statement outlining its interpretation of “deception.”⁸⁵ This policy statement guides the FTC's enforcement regime.⁸⁶

The FTC defines deception as “a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment.”⁸⁷ An omission is deceptive when (1) the “information necessary to prevent a ... reasonable expectation or belief from being misleading is not disclosed,”⁸⁸ and (2) “consumers are likely to have chosen differently but for the deception.”⁸⁹ An omission is deceptive when it is “likely to mislead reasonable consumers under the circumstances. The test is whether the consumer's interpretation or reaction is reasonable.”⁹⁰ An omission is sufficiently deceptive as long as it misleads “a significant minority” of reasonable consumers.⁹¹ The Sixth Circuit has affirmed that a “significant minority” can be as few as 10

83. 15 U.S.C. § 45(a)(2) (2012) (emphasis added).

84. *See id.* § 45. The FTC Act defines “false advertising” with respect to regulating the advertising of “food, drugs, devices, services, or cosmetics” under 15 U.S.C. § 52. *See id.* § 55(a)(1) (“[A]n advertisement, other than labeling, which is misleading in a material respect.”).

85. *See* Letter from James C. Miller III, Chairman, Fed. Trade Comm'n, to the Honorable John D. Dingell, Chairman, Comm. on Energy & Commerce, U.S. House of Representatives (Oct. 14, 1983) [hereinafter *FTC POLICY STATEMENT ON DECEPTION*], *appended to* Cliffdale Assocs., Inc., 103 F.T.C. 110 app. at 174 (1984).

86. *See* ABA SECTION OF ANTITRUST LAW, *FTC PRACTICE AND PROCEDURE MANUAL* 26-28 (2d ed. 2014).

87. *See* *FTC POLICY STATEMENT ON DECEPTION*, *supra* note 85, at app. at 176.

88. *Id.* at app. at 175 n.4; *see also* *Aronberg v. FTC*, 132 F.2d 165, 167 (7th Cir. 1942) (“The ultimate impression upon the mind of the reader arises from the sum total of not only what is said but also of all that is reasonably implied.”).

89. *FTC POLICY STATEMENT ON DECEPTION*, *supra* note 85, at app. at 176.

90. *Id.* at app. at 177 (footnote omitted).

91. *Id.* at app. at 177 n.20.

percent of reasonable consumers.⁹² This definition of deception does not require the FTC to prove actual deception⁹³ or an intent to deceive.⁹⁴

The Guides elaborate on the application of these principles in the context of the use of endorsements and testimonials in advertising.⁹⁵ Although the Guides are promulgated under the FTC's rulemaking authority,⁹⁶ they are distinct from trade regulation rules.⁹⁷ Thus, the Guides provide only "the general principles that the Commission will use in evaluating endorsements and testimonials," and compliance with those principles is voluntary, not compulsory.⁹⁸

The Guides define an endorsement as "any advertising message ... that *consumers are likely to believe* reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser."⁹⁹ An endorser is "[t]he party whose opinions, beliefs, findings, or experience the message appears to reflect ... and may be an individual, group, or institution."¹⁰⁰ To prevent an endorsement from being deceptive, the Guides require disclosure of any "connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement

92. See *Firestone Tire & Rubber Co. v. FTC*, 481 F.2d 246, 249 (6th Cir. 1973) (affirming the FTC's finding of deception when the ad "misled 15% (or 10%) of the buying public").

93. See FTC POLICY STATEMENT ON DECEPTION, *supra* note 85, at app. at 176 ("The issue is whether the act or practice is likely to mislead, rather than whether it causes actual deception.").

94. See *Regina Corp. v. FTC*, 322 F.2d 765, 768 (3d Cir. 1963) ("Proof of petitioner's intention to deceive is not a prerequisite to a finding of a violation, it is sufficient that deception is possible." (citation omitted)).

95. See 16 C.F.R. § 255.0(a) (2017).

96. See 15 U.S.C. § 57a(a)(1)(A) (2012) ("[T]he Commission may prescribe ... interpretative rules and general statements of policy with respect to unfair or deceptive acts or practices in or affecting commerce.").

97. FEDERAL TRADE COMMISSION: LAW, PRACTICE AND PROCEDURE § 13.01 (2017) ("Guides, enforcement policy statements and interpretations are not conclusive legally on the issue of whether the law has been violated, but they do inform the public about the Commission's enforcement intentions and the likely outcome of a proceeding involving the issues covered. On the other hand, trade regulation rules constitute a statement of the law, and the legality of the prohibited conduct ceases to be an issue to be litigated in an enforcement action." (citations omitted)).

98. 16 C.F.R. § 255.0(a).

99. *Id.* § 255.0(b) (emphasis added).

100. *Id.*

(*i.e.*, the connection is not reasonably expected by the audience).¹⁰¹ All disclosures must be made “clearly and conspicuously.”¹⁰²

Although the Guides repeatedly state that all disclosures must be made “clearly and conspicuously,” the Guides do not define this standard.¹⁰³ The FTC has issued additional guidance to clarify how this standard applies.¹⁰⁴

In evaluating whether a disclosure is likely to be clear and conspicuous, advertisers should consider its placement in the ad and its proximity to the relevant claim.... Additional considerations include: the prominence of the disclosure; whether it is unavoidable; whether other parts of the ad distract attention from the disclosure; whether the disclosure needs to be repeated at different places on a website; ... and whether the language of the disclosure is understandable to the intended audience.¹⁰⁵

With respect to proximity and placement, this framework requires that disclosures are “effectively communicated to consumers *before* they make a purchase or incur a financial obligation.”¹⁰⁶ The FTC considers all of these factors together to determine whether “the overall net impression of the ad” is misleading to a reasonable consumer.¹⁰⁷

These general principles are adaptable and intended to be applied on a case-by-case basis.¹⁰⁸ Ultimately, “[l]iability as an endorser turns on whether a consumer would reasonably attribute the

101. *Id.* § 255.5. The FTC can require influencers to clearly and conspicuously disclose material relationships because the First Amendment does not protect misleading commercial speech. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n, 447 U.S. 557, 563 (1980).

102. 16 C.F.R. § 255.5.

103. *See id.* §§ 255.0, 255.5.

104. *See, e.g.*, FED. TRADE COMM’N, .COM DISCLOSURES: HOW TO MAKE EFFECTIVE DISCLOSURES IN DIGITAL ADVERTISING (2013), <https://www.ftc.gov/system/files/documents/plain-language/bus41-dot-com-disclosures-information-about-online-advertising.pdf> [<https://perma.cc/4HLH-L46W>].

105. *Id.* at i-ii.

106. *Id.* at 14 (emphasis added); *see also* FTC POLICY STATEMENT ON DECEPTION, *supra* note 85, at app. at 180 (“Thus, when the first contact between a seller and a buyer occurs through a deceptive practice, the law may be violated even if the truth is subsequently made known to the purchaser.”).

107. *See* FED. TRADE COMM’N, *supra* note 104, at 6.

108. 16 C.F.R. § 255.0(a) (“Whether a particular endorsement or testimonial is deceptive will depend on the specific factual circumstances of the advertisement at issue.”).

views, opinions, or beliefs expressed as personal to the speaker or merely as those of the sponsoring advertiser.”¹⁰⁹ Because this framework is context dependent, it is flexible enough to be applied across the broad spectrum of existing and emerging advertising platforms—including influencer marketing.¹¹⁰

The Guides offer several examples that specifically demonstrate how these principles apply to influencers.¹¹¹ In one example, the influencer must disclose that she received a product for free through a network marketing program.¹¹² Even though the influencer’s decision to write a review on her personal blog is voluntary, this post is an endorsement and she must disclose it because her receipt of the product for free is a material connection that her readers might not reasonably expect.¹¹³ In another example, disclosure is similarly required when an influencer receives a video game system for free from the manufacturer in exchange for posting a review of the product on his personal blog.¹¹⁴ Again, the influencer’s relationship to the brand is not obvious to consumers without a disclosure.¹¹⁵ Furthermore, these examples demonstrate that the nature of the relationship between the influencer and the brand—in which the brand gave the influencer something of value—is a fact that is likely to have a significant impact on how much weight and credibility a consumer gives to the influencer’s endorsement.¹¹⁶

The examples in the Guides also highlight that the influencer and the advertiser are both responsible for ensuring that the material relationship is clearly and conspicuously disclosed with the endorsement.¹¹⁷ One example expressly imputes liability to an

109. *FTC v. Garvey*, No. CV 00-9358 (GAF)(CWx), 2001 U.S. Dist. LEXIS 25060, at *18 (C.D. Cal. Nov. 8, 2001).

110. *See* FED. TRADE COMM’N, *supra* note 104, at 2-4.

111. *See* 16 C.F.R. §§ 255.0 ex. 8, 255.1 ex. 5, 255.5 ex. 7.

112. *Id.* § 255.0 ex. 8.

113. *Id.*; *see id.* § 255.5.

114. *Id.* § 255.5 ex. 7.

115. *Id.*

116. *See id.* §§ 255.0 ex. 8, 255.5 ex. 7.

117. *See id.* § 255.5 ex. 7 (“Accordingly, the blogger should clearly and conspicuously disclose that he received the gaming system free of charge. The manufacturer should advise him at the time it provides the gaming system that this connection should be disclosed, and it should have procedures in place to try to monitor his postings for compliance.”); *see also id.* § 255.1(d) (“Advertisers are subject to liability for ... failing to disclose material connections between themselves and their endorsers. Endorsers also may be liable for statements made

influencer “if she fails to disclose clearly and conspicuously that she is being paid for her services.”¹¹⁸ Moreover, an advertiser must monitor the influencers it works with to ensure that those influencers make clear and conspicuous endorsement disclosures.¹¹⁹ When an advertiser discovers deficient or nonexistent disclosures, the advertiser must “take steps necessary to halt the continued publication of deceptive representations.”¹²⁰ The advertiser cannot escape liability for the influencer’s deceptive representations or omissions by employing an advertising service to develop and administer the advertising campaign.¹²¹ As Mary Engle, Associate Director for Advertising Practices at the FTC, has emphasized, the advertiser’s duty to monitor extends to “*all* third-party marketing affiliates that may endorse or promote a brand.”¹²²

B. Disclosure Requirements for Affiliate Links

An influencer’s use of an affiliate link is an endorsement that requires clear and conspicuous disclosure of the relationship between the influencer and the advertiser. By broadly defining endorsements to include “*any* advertising message,” the FTC ensured that regulations governing endorsements would extend to new and nontraditional forms of advertising.¹²³ New and nontraditional forms of advertising—such as affiliate marketing—are endorsements when “*consumers are likely to believe* [the advertising message] reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser.”¹²⁴ Affiliate links are endorsements because an influencer’s followers are likely to attribute the influencer’s recommendation of a product and inclusion

in the course of their endorsements.”).

118. *Id.* § 255.1 ex. 5.

119. *Id.*

120. *Id.*

121. *See id.* (“In order to limit its potential liability, the advertiser should ensure that the advertising service provides guidance and training to its bloggers concerning the need to ensure that statements they make are truthful and substantiated.”).

122. Anthony DiResta et al., Holland & Knight LLP, *Regulators and Industry Thought Leaders Discuss Issues in Social Media Advertising—Highlights from “The FTC, Native Advertising and Consumer Privacy,”* JD SUPRA (Sept. 29, 2016), <http://www.jdsupra.com/legal/news/regulators-and-industry-thought-leaders-22009/> [https://perma.cc/7UMW-SPV6].

123. 16 C.F.R. § 255.0(b) (emphasis added).

124. *Id.* (emphasis added).

of a link to purchase that product to the influencer, not the brand.¹²⁵ Further, the FTC requires clear and conspicuous disclosure of any connection between influencers and brands “that might materially affect the weight or credibility of the endorsement.”¹²⁶ Therefore, an influencer must clearly and conspicuously disclose her use of an affiliate link because the link allows both the influencer and the brand to profit from an influencer’s personal recommendation to her followers that a particular product is worth purchasing, and that connection may materially affect the weight a consumer gives to the influencer’s endorsement.¹²⁷

In its May 2015 publication, *The FTC’s Endorsement Guides: What People Are Asking*, the FTC confirmed that it requires influencers to clearly and conspicuously disclose any endorsement compensated through affiliate links.¹²⁸ The FTC reiterated that the influencer should place the disclosure as close to the endorsement as possible, and that the influencer must include the disclosure each time she shares an affiliate link on any platform.¹²⁹ The FTC indicated that “affiliate link” by itself would likely not be an adequate disclosure because “[c]onsumers might not understand that ‘affiliate link’ means that the person placing the link is getting paid for purchases through the link.”¹³⁰ Instead, the FTC recommended influencers state, “I get commissions for purchases made through links in this post.”¹³¹

The FTC also rejected the argument that it might be common knowledge that influencers receive payment for promoting products and make commissions from the links on their websites.¹³² The FTC reasoned that it is immaterial that a majority of consumers might be aware of these practices because any omission “that misleads a

125. See FED. TRADE COMM’N, *THE FTC’S ENDORSEMENT GUIDES: WHAT PEOPLE ARE ASKING* 18 (2015) [<https://perma.cc/34JB-X2XG>]; see also FED. TRADE COMM’N, *supra* note 14 (updating *The FTC’s Endorsement Guides: What People Are Asking* with answers to new questions in September 2017).

126. 16 C.F.R. § 255.5.

127. See Mari, *supra* note 57.

128. See FED. TRADE COMM’N, *supra* note 14.

129. See *id.*

130. *Id.*

131. *Id.*

132. *Id.*

significant *minority* of reasonable consumers is deceptive.”¹³³ Similarly, distinctions between a personal blog and a full-time influencer’s blog are immaterial, because in either instance it is likely that a significant minority of reasonable consumers might not be aware that the influencer is receiving commissions from the links on her website absent a disclosure.¹³⁴

In accordance with the Guides, the influencer is responsible for clearly and conspicuously disclosing that she earns a commission from an affiliate link, and the brand is responsible for implementing a monitoring program to ensure adequate disclosures accompany an influencer’s affiliate link.¹³⁵ The FTC has affirmatively stated that pursuing an enforcement action against an individual influencer for endorsement disclosure violations “might be appropriate in certain circumstances, such as if the endorser has continued to fail to make required disclosures despite warnings.”¹³⁶ Nevertheless, the FTC has stated that it is generally not actively monitoring individual influencers for insufficient and nonexistent endorsement disclosures.¹³⁷ The FTC will evaluate, on a case-by-case basis, any concerns brought to its attention about a particular influencer’s insufficient or nonexistent endorsement disclosures.¹³⁸

The FTC generally focuses its enforcement efforts in this area on brands and their advertising agencies.¹³⁹ Brands cannot avoid liability by delegating all or part of a promotional program to an outside entity.¹⁴⁰ Additionally, the FTC will hold advertising agencies that pay and direct influencers responsible for the inadequate and nonexistent endorsement disclosures of those influencers.¹⁴¹ These intermediaries, like brands, are responsible for educating influencers on adequate disclosures and implementing a reasonable

133. FTC POLICY STATEMENT ON DECEPTION, *supra* note 85, at app. at 177 n.20 (emphasis added); *see also* FED. TRADE COMM’N, *supra* note 14.

134. *See* FED. TRADE COMM’N, *supra* note 14.

135. *See supra* notes 117-19 and accompanying text.

136. FED. TRADE COMM’N, *supra* note 14.

137. *See id.*

138. *See id.*; *see also infra* Part IV.A (discussing the FTC’s issuance of warning letters to Instagram influencers in response to letters from Public Citizen and Truth in Advertising).

139. *See* FED. TRADE COMM’N, *supra* note 14.

140. *See id.*; *see also supra* notes 121-22 and accompanying text.

141. *See* FED. TRADE COMM’N, *supra* note 14.

monitoring program to ensure influencers make adequate disclosures.¹⁴²

III. THE FTC'S ENFORCEMENT REGIME

The FTC has a variety of enforcement mechanisms available to address an influencer's failure to clearly and conspicuously disclose that she earns a commission from an affiliate link. In accordance with the FTC's consumer protection mission, these enforcement mechanisms are intended to be exercised in a preventative, not punitive, manner.¹⁴³ Thus, the prevention of future violations is the primary focus of each enforcement action.¹⁴⁴

Additionally, the FTC must exercise its enforcement discretion strategically to maximize its limited resources.¹⁴⁵ This enforcement discretion includes the consideration of the number of consumers potentially deceived, the degree of physical or economic harm, the incentives for brands to employ a particular deceptive practice, and the likelihood that market forces will correct that practice.¹⁴⁶ Because the FTC addresses enforcement on a case-by-case basis,¹⁴⁷ the FTC's influencer endorsement enforcement actions provide insight that is critical to understanding when and how the FTC's endorsement mechanisms can be used to prevent consumer deception.

142. *See id.*

143. *See* JEF I. RICHARDS, DECEPTIVE ADVERTISING: BEHAVIORAL STUDY OF A LEGAL CONCEPT 12 (1990). Section 5 of the FTC Act empowers the FTC "to *prevent* persons, partnerships, or corporations ... from using ... unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(2) (2012) (emphasis added).

144. *See infra* Part III.B.

145. The FTC received over three million consumer complaints in 2015. *Stats & Data 2015*, FED. TRADE COMM'N, <https://www.ftc.gov/node/943403> [<https://perma.cc/692M-FKJP>]. In contrast, it only exercised its prosecutorial discretion to file 107 actions and obtain 178 orders. *Id.* During this same time period, the FTC was operating on a \$293 million budget with 1144 full-time employees, split between its consumer protection and competition promotion missions. *FTC Appropriation and Full-Time Equivalent (FTE) History*, FED. TRADE COMM'N, <https://www.ftc.gov/about-ftc/bureaus-offices/office-executive-director/financial-management-office/ftc-appropriation> [<https://perma.cc/J9MH-N47F>]; *see also* *Human Capital Management Office*, FED. TRADE COMM'N, <https://www.ftc.gov/about-ftc/bureaus-offices/office-executive-director/human-capital-management-office> [<https://perma.cc/K5F9-JRXW>].

146. *See* RICHARDS, *supra* note 143, at 17-19; *see also* FTC POLICY STATEMENT ON DECEPTION, *supra* note 85, at app. at 180-81, 180 nn.36-37.

147. *See* FED. TRADE COMM'N, *supra* note 14.

A. The FTC's Enforcement Mechanisms

The FTC has broad investigative authority that provides the basis for its enforcement mechanisms.¹⁴⁸ This investigative authority empowers the FTC “[t]o gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any person, partnership, or corporation engaged in or whose business affects commerce.”¹⁴⁹ Through its far-reaching investigative authority, the FTC can require individuals and brands to submit reports responding to specific questions.¹⁵⁰ The FTC can use this reporting mechanism independently from a law enforcement action to gather nonpublic data on particular business practices and develop responsive policy recommendations.¹⁵¹

Opening an investigation into whether an advertiser has engaged in a deceptive practice is the FTC’s first step toward any enforcement action.¹⁵² An investigation can be initiated “upon the request of the President, Congress, governmental agencies, or the Attorney General; upon referrals by the courts; upon complaint by members of the public; or by the Commission upon its own initiative.”¹⁵³ The launch of an investigation does not guarantee that the FTC will pursue an enforcement action.¹⁵⁴

The FTC may resolve a pending investigation by closing the investigation, seeking a consent order, or issuing a complaint.¹⁵⁵ When the FTC closes an investigation, it may issue a public closing letter indicating that the FTC is not recommending enforcement action.¹⁵⁶ Closing letters do not provide a determination as to

148. See *A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority*, FED. TRADE COMM'N (July 2008), <https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority> [<https://perma.cc/DV35-FNU8>]; see also 15 U.S.C. § 43 (2012) (“The Commission may ... prosecute any inquiry necessary to its duties.”).

149. 15 U.S.C. § 46(a).

150. See *id.* § 46(b).

151. See FED. TRADE COMM'N, *supra* note 148.

152. See ABA SECTION OF ANTITRUST LAW, *supra* note 86, at 183.

153. 16 C.F.R. § 2.1 (2017).

154. See ABA SECTION OF ANTITRUST LAW, *supra* note 86, at 195.

155. *Id.*

156. See, e.g., Letter from Charles A. Harwood, Reg'l Dir., Fed. Trade Comm'n, to Yaron Dori, Counsel, Microsoft Corp., & Amy R. Mudge, Counsel, Starcom MediaVest Grp. (Aug. 26, 2015) [hereinafter *Microsoft and Starcom Letter*], <https://www.ftc.gov/system/files/documents/>

whether a violation has occurred, and the FTC reserves the right to take further action on the matter in the future.¹⁵⁷ The FTC and an advertiser may enter into a consent order before or after the FTC issues a complaint.¹⁵⁸ A consent order allows the advertiser to settle deception allegations, often without admitting liability, and waives any right to judicial review.¹⁵⁹ An advertiser is liable for a civil penalty of up to \$40,000 for each violation of a consent order.¹⁶⁰

Following an investigation, the FTC can bring a case directly in federal court.¹⁶¹ To enforce any civil penalty or seek consumer redress, the FTC must pursue litigation in court.¹⁶² The FTC may elect to challenge a deceptive or unfair practice directly in court by seeking preliminary and permanent injunctions.¹⁶³ Judicial enforcement is advantageous because “the court may award both prohibitory and monetary equitable relief in one step” and “a judicial injunction becomes effective immediately.”¹⁶⁴

Alternatively, when the FTC issues a complaint and the advertiser contests the allegations, the parties may proceed with an administrative trial and an administrative law judge will recommend either entering a cease and desist order or dismissing the complaint.¹⁶⁵ An advertiser is liable for a civil penalty of up to \$40,000 for each violation of a cease and desist order.¹⁶⁶ After all judicial review of a cease and desist order is complete, the FTC may seek relief for consumers by filing a civil action in federal court against the advertiser.¹⁶⁷

Once a cease and desist order is final, the FTC can hold a nonparty liable for committing a deceptive act that violates the order.¹⁶⁸ The FTC can collect a civil penalty from the nonparty, provided the FTC can prove that it had placed the nonparty on

closing_letters/nid/150902machinima_letter.pdf [https://perma.cc/3QKD-4TQZ].

157. *See, e.g., id.* at 2.

158. *See* ABA SECTION OF ANTITRUST LAW, *supra* note 86, at 196.

159. FED. TRADE COMM’N, *supra* note 148.

160. *See* 16 C.F.R. § 1.989(c) (2017).

161. *See* FED. TRADE COMM’N, *supra* note 148.

162. *Id.*

163. *See id.*; *see also* 15 U.S.C. § 53(b) (2012).

164. FED. TRADE COMM’N, *supra* note 148.

165. *Id.*

166. 15 U.S.C. § 45(m)(1)(B) (2012); 16 C.F.R. § 1.98(e) (2017).

167. *See* 15 U.S.C. § 57b(a)(2); *see also* FED. TRADE COMM’N, *supra* note 148.

168. *See* 15 U.S.C. § 45(m)(1)(B); FED. TRADE COMM’N, *supra* note 148.

notice by providing the nonparty with a copy or synopsis of the order.¹⁶⁹ A similar strict liability enforcement mechanism is available through the FTC's administrative rulemaking power.¹⁷⁰ Rulemaking enables the FTC to address deceptive practices in a particular industry by identifying specific acts and practices that it considers to be deceptive.¹⁷¹ The FTC can hold a party strictly liable for a civil penalty of up to \$40,000 for each violation of an administrative rule provided the party had "actual knowledge or knowledge fairly implied ... that such act ... is prohibited."¹⁷² Regardless of a party's knowledge, the FTC can hold a party strictly "liable for injury caused to consumers by [a] rule violation."¹⁷³

The FTC also has a variety of opportunities to promote voluntary compliance through outreach and engagement with stakeholders.¹⁷⁴ "Surfs" are one such opportunity.¹⁷⁵ The FTC collaborates with law enforcement agencies on organized surfs of the Internet to identify instances of deceptive advertising practices.¹⁷⁶ Following a surf, the FTC issues warning letters to the individuals and companies that were found to be using potentially deceptive advertising practices.¹⁷⁷ A warning letter identifies the questionable practice, explains the applicable law, and provides an opportunity for the individual or company to voluntarily comply with the law.¹⁷⁸

Public outreach mechanisms include disseminating business and consumer education publications and working papers, hosting public workshops and seminars, and giving speeches at industry

169. See FED. TRADE COMM'N, *supra* note 148.

170. See *id.*

171. See 15 U.S.C. § 57a(a)(1)(B); FED. TRADE COMM'N, *supra* note 148. Recall that the Guides are promulgated under this authority, but are distinct from and do not carry the same weight as trade regulation rules. See *supra* notes 96-98 and accompanying text.

172. 15 U.S.C. § 45(m)(1)(A); 16 C.F.R. 1.98(d) (2017).

173. FED. TRADE COMM'N, *supra* note 148 ("The Commission may pursue such recovery in a suit for consumer redress under Section 19 of the FTC Act.")

174. William E. Kovacic, *The Federal Trade Commission as Convenor: Developing Regulatory Policy Norms Without Litigation or Rulemaking*, 13 COLO. TECH. L.J. 17, 19 (2015) ("Congress gave the FTC capacity to serve as a *convenor*—to engage in a diverse array of activities that facilitate norms development.")

175. See ABA SECTION OF ANTITRUST LAW, *supra* note 86, at 220.

176. *Id.*

177. *Id.*

178. See *id.*

conferences.¹⁷⁹ Through workshops and seminars, the FTC convenes academics, industry representatives, and consumer advocates to discuss regulatory concerns and potential solutions.¹⁸⁰ By creating a forum for stakeholders to engage in a productive discourse, these workshops and seminars provide the FTC with invaluable information to further “its policymaking and enforcement efforts” and raise the profile of significant regulatory issues.¹⁸¹ These workshops have also led to substantive staff or FTC reports.¹⁸²

The FTC also leverages its social media presence, in a similar fashion as influencers, to increase awareness of its enforcement activities and regulatory guidance.¹⁸³ Its social media presence enables the FTC “to answer questions and solicit input from the public on various consumer protection subjects.”¹⁸⁴ For instance, the FTC has used Twitter to host conversations with consumers on issues involving online security and identity theft.¹⁸⁵ In September 2017, the FTC held a Twitter chat that “address[ed] a range of issues” regarding endorsement disclosures.¹⁸⁶

All of these mechanisms align with the FTC’s mission of preventing the use of unfair or deceptive practices in commerce.¹⁸⁷ Because

179. 1 ABA SECTION OF ANTITRUST LAW, CONSUMER PROTECTION LAW DEVELOPMENTS (SECOND) 523 (2016).

180. *See id.* at 153, 525; *see, e.g.*, Press Release, Fed. Trade Comm’n, FTC to Host Spring Seminars on Emerging Consumer Privacy Issues (Dec. 2, 2013), <https://www.ftc.gov/news-events/press-releases/2013/12/ftc-host-spring-seminars-emerging-consumer-privacy-issues> [<https://perma.cc/PBT9-EB3K>].

181. ABA SECTION OF ANTITRUST LAW, *supra* note 179, at 525.

182. *See, e.g., id.* at 153; FED. TRADE COMM’N, FTC STAFF REPORT: SELF-REGULATORY PRINCIPLES FOR ONLINE BEHAVIORAL ADVERTISING 1-2 (2009), <https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-staff-report-self-regulatory-principles-online-behavioral-advertising/p085400behavadreport.pdf> [<https://perma.cc/UF49-L3NA>].

183. ABA SECTION OF ANTITRUST LAW, *supra* note 179, at 525-26.

184. *Id.*

185. *See, e.g., Tax Identity Theft Awareness Twitter Chat* (Jan. 31, 2017, 3:00 PM), FED. TRADE COMM’N, <https://www.ftc.gov/news-events/events-calendar/2017/01/tax-identity-theft-awareness-twitter-chat> [<https://perma.cc/47KR-AVRF>]; *Twitter Chat: Talking to Kids About Online Safety, Security, and Privacy*, FED. TRADE COMM’N (Feb. 14, 2017, 2:00 PM), <https://www.ftc.gov/news-events/events-calendar/2017/02/twitter-chat-talking-kids-about-online-safety-security-privacy> [<https://perma.cc/W9RF-C6T8>].

186. Press Release, Fed. Trade Comm’n, FTC to Hold Twitter Chat on Social Media Influencer Disclosures (Sept. 18, 2017), <https://www.ftc.gov/news-events/press-releases/2017/09/ftc-hold-twitter-chat-social-media-influencer-disclosures> [<https://perma.cc/2V72-RMWE>].

187. 15 U.S.C. § 45(a) (2012).

the launch of an investigation does not guarantee that the FTC will pursue an enforcement action, the FTC can leverage its investigative authority and prosecutorial discretion to motivate advertisers to take immediate corrective action and update internal policies.¹⁸⁸ Moreover, the risk or actual issuance of an administrative complaint can incentivize an advertiser to enter a consent order consisting of a voluntary agreement to discontinue the alleged deceptive practices and take steps to prevent future violations.¹⁸⁹ Additionally, the civil penalties facing advertisers who violate an order are more preventative than punitive because they discourage advertisers from engaging in particular deceptive practices.¹⁹⁰ The FTC has a variety of enforcement mechanisms to choose from when evaluating how best to prevent a particular deceptive advertising practice.

B. Insights from the FTC's Exercise of Its Enforcement Discretion

Because the FTC addresses enforcement on a case-by-case basis, the FTC's influencer endorsement enforcement actions to date provide insight that is critical to understanding who will be subject to an FTC endorsement enforcement investigation or action, when the FTC will pursue consent orders, and on what terms the FTC will settle an action.

1. Parties Subject to Endorsement Enforcement

Under the Guides, brands share responsibility for adequate endorsement disclosures with influencers.¹⁹¹ Although the FTC has not ruled out bringing enforcement actions against individual influencers, the FTC primarily focuses its enforcement efforts on brands and their advertising firms.¹⁹² To date, the FTC has enforced endorsement disclosure requirements not only against brands, but also

188. See *infra* Part III.B.

189. See *infra* Part III.B.

190. See FED. TRADE COMM'N, *supra* note 148.

191. See *supra* notes 117-22 and accompanying text.

192. See FED. TRADE COMM'N, *supra* note 14; *supra* notes 135-39 and accompanying text.

against an entertainment marketing network,¹⁹³ several public relations firms,¹⁹⁴ and three individual influencers.¹⁹⁵

In 2011, the FTC pursued an endorsement enforcement action against the brand Legacy Learning Systems, Inc. (Legacy).¹⁹⁶ The FTC alleged that through Legacy's online affiliate marketing program, individuals "falsely posed as ordinary consumers or independent reviewers without clearly disclosing they were paid substantial commissions for every sale they generated."¹⁹⁷ Influencers who shared Legacy's affiliate links earned commissions "ranging from 20% to 45% of the cost of each instructional course sold."¹⁹⁸ Influencers endorsed Legacy's products on their personal websites, and elsewhere on the Internet, without disclosing their material connection to Legacy.¹⁹⁹ The FTC found that twenty-five of these affiliates generated "at least \$5 million in sales."²⁰⁰ The FTC pursued enforcement against Legacy for the "fail[ure] to disclose, or disclose adequately, that the endorser receives financial compensation from the sale of Legacy's products" because "[t]his fact would be

193. See Press Release, Fed. Trade Comm'n, Xbox One Promoter Settles FTC Charges That It Deceived Consumers with Endorsement Videos Posted by Paid 'Influencers' (Sept. 2, 2015), <https://www.ftc.gov/news-events/press-releases/2015/09/xbox-one-promoter-settles-ftc-charges-it-deceived-consumers> [<https://perma.cc/QQ2J-RS2S>].

194. See, e.g., Letter from Mary K. Engle, Assoc. Dir., Div. of Advert. Practices, Fed. Trade Comm'n, to Christopher Smith, Counsel, Hyundai Motor Am. (Nov. 16, 2011) [hereinafter Hyundai Closing Letter], https://www.ftc.gov/sites/default/files/documents/closing_letters/hyundai-motor-america/111116hyundaimotorletter.pdf [<https://perma.cc/BE2A-BAJ8>].

195. See Press Release, Fed. Trade Comm'n, *supra* note 24; Letter from Mary K. Engle, Assoc. Dir., Div. of Advert. Practices, Fed. Trade Comm'n, to George L. Paul, Counsel, Alison Rhodes-Jacobson 1 (Mar. 10, 2014) [hereinafter Rhodes-Jacobson Letter], <https://www.ftc.gov/enforcement/cases-proceedings/closing-letters/alison-rhodes-jacobson> [<https://perma.cc/QC5E-NSUX>]. Although the FTC sent warning letters to individual influencers in April 2017, those letters did not initiate any formal investigation or other enforcement action against individual influencers. See Press Release, Fed. Trade Comm'n, FTC Staff Reminds Influencers and Brands to Clearly Disclose Relationship (Apr. 19, 2017), <https://www.ftc.gov/news-events/press-releases/2017/04/ftc-staff-reminds-influencers-brands-clearly-disclose> [<https://perma.cc/GAS7-Q2GP>].

196. See Press Release, Fed. Trade Comm'n, FTC Approves Final Order Settling Charges That Firm Used Misleading Online Reviews (June 10, 2011), <https://www.ftc.gov/news-events/press-releases/2011/06/ftc-approves-final-order-settling-charges-firm-used-misleading> [<https://perma.cc/5ARA-VAZW>].

197. *Id.*

198. Legacy Learning Sys., Inc., 151 F.T.C. 383, 384 (2011) (No. C-4323) (Complaint).

199. See *id.* at 384-85.

200. *Id.* at 386.

material to consumers in their purchasing decision.”²⁰¹ In June 2011, the FTC finalized the order settling charges of deceptive advertising against Legacy.²⁰²

In some cases, the FTC has not pursued enforcement against the brand, and it has proceeded instead with enforcement only against the party that is responsible for directing and compensating the influencers.²⁰³ As a result of inadequate endorsement disclosures in a YouTube influencer campaign promoting Microsoft’s Xbox One system, the FTC initiated an investigation into the actions of Microsoft Corporation (Microsoft); Microsoft’s advertising agency, Starcom Media Vest Group (Starcom); and Machinima, Inc. (Machinima), an entertainment network that contracted with Starcom to run the YouTube influencer campaign.²⁰⁴ Ultimately, the FTC closed its investigation into Microsoft and Starcom and issued a complaint against Machinima.²⁰⁵ In its closing letter, the FTC acknowledged that Microsoft and Starcom were responsible for the influencers’ failures to disclose.²⁰⁶ Nevertheless, the FTC found that “[t]he failures to disclose here appear to be isolated incidents that occurred in spite of, and not in the absence of, policies and procedures designed to prevent such lapses.”²⁰⁷ The FTC considered that “Microsoft and Starcom took swift action to require that Machinima insert disclosures into the campaign videos *once they learned* that Machinima had paid the influencers and that no disclosures had been made.”²⁰⁸ Thus, the FTC also pursued enforcement action only against

201. *Id.* at 387.

202. Press Release, Fed. Trade Comm’n, *supra* note 196.

203. *Compare* Complaint, Machinima, Inc., F.T.C. Docket No. C-4569 at paras. 3, 5, 8, 25 (Mar. 16, 2016) [hereinafter Machinima Complaint], <https://www.ftc.gov/system/files/documents/cases/160317machinimacmpt.pdf> [<https://perma.cc/QZL6-8NUQ>], *with* Complaint, Warner Bros. Home Entm’t Inc., F.T.C. Docket No. C-4595, at paras. 4, 7-10, 16 (Nov. 17, 2016) [hereinafter Warner Bros. Complaint], https://www.ftc.gov/system/files/documents/cases/161811warner_bros_complaint.pdf [<https://perma.cc/3RB9-N8VN>] (asserting that although Warner Bros. hired an advertising agency to run a YouTube influencer campaign, Warner Bros. set the minimum requirements for each influencer’s video and the videos were subject to pre-approval by Warner Bros.; thus, Warner Bros. was responsible for ensuring that the influencers adequately disclosed their material relationship).

204. *See* Press Release, Fed. Trade Comm’n, *supra* note 193.

205. *See id.*

206. Microsoft and Starcom Letter, *supra* note 156, at 2.

207. *Id.*

208. *Id.* (emphasis added).

Machinima, the party responsible for recruiting, contracting with, directing, and compensating the influencers.²⁰⁹

On September 7, 2017, the FTC announced its first complaint against individual influencers.²¹⁰ Trevor “TmarTn” Martin and Thomas “Syndicate” Cassell both posted on YouTube and Twitter promoting their company, CSGO Lotto, Inc. without “disclos[ing] they jointly owned the company.”²¹¹ Although this action targeted two individual influencers in their individual capacities, the action also targeted their company, CSGO Lotto, Inc.²¹² CSGO Lotto, Inc. “allegedly paid other well-known influencers thousands of dollars to promote the site on YouTube, Twitch, Twitter, and Facebook, without requiring them to disclose the payments in their social media posts.”²¹³

Naming Martin and Cassell as individuals in this action may signal that the FTC is serious about enforcing endorsement disclosures against individual influencers. However, Martin and Cassell were not targeted solely because they promoted CGSO Lotto without making proper endorsement disclosures.²¹⁴ Martin is the President and Cassell is the Vice President of CGSO Lotto, Inc.²¹⁵ Notably, the FTC did not target any other influencers who were identified in the complaint as failing to make proper endorsement disclosures.²¹⁶

There is at least one other instance in which the FTC initiated an investigation into an individual influencer for failing to disclose her material relationship with a brand.²¹⁷ The influencer had made numerous paid media appearances endorsing a home security system.²¹⁸ The FTC’s investigation reviewed the influencer’s media appearances, website, and blog posts to determine whether she had

209. See Machinima Complaint, *supra* note 203, paras. 9-22.

210. See Press Release, Fed. Trade Comm’n, *supra* note 24.

211. See *id.*

212. See Complaint, CSGO Lotto, Inc., F.T.C. File No. C-4632 (Nov. 28, 2017) [hereinafter CSGO Lotto Complaint], https://www.ftc.gov/system/files/documents/cases/1623184_csgo_lotto_complaint.pdf [<https://perma.cc/Y72M-YAPB>].

213. See Press Release, Fed. Trade Comm’n, *supra* note 24.

214. See CSGO Lotto Complaint, *supra* note 212, paras. 2-3.

215. *Id.*

216. See *generally id.*

217. See Rhodes-Jacobson Letter, *supra* note 195, at 1.

218. See *id.*

adequately disclosed her relationship with the brand.²¹⁹ Ultimately, the FTC issued a closing letter to the influencer and pursued an enforcement action against the brand.²²⁰ In deciding to close their investigation, the FTC considered that the influencer immediately took steps to “revise her website and other online materials within her control to include appropriate disclosures.”²²¹

Even though the FTC is not actively monitoring the behavior of individual influencers, the FTC is willing to take at least the first step toward an enforcement action against an individual influencer by initiating an investigation into that individual influencer’s endorsement disclosure practices. And, depending on the circumstances, the FTC is also willing to issue a complaint against individual influencers and their company.

2. Closing Letter Commonalities and the Pursuit of Consent Orders

The FTC has issued closing letters in investigations involving the enforcement of endorsement disclosure requirements when the FTC determines that the brand’s or advertising agency’s failure to require an influencer to disclose their material relationship with the brand is an isolated incident with a limited reach.²²² In most of these

219. *See id.*

220. *See id.*; Press Release, Fed. Trade Comm’n, Home Security Company ADT Settles FTC Charges that Endorsements Deceived Consumers (Mar. 6, 2014), <https://www.ftc.gov/news-events/press-releases/2014/03/home-security-company-adt-settles-ftc-charges-endorsements> [<https://perma.cc/7PKZ-5V8L>].

221. Rhodes-Jacobson Letter, *supra* note 195, at 1-2.

222. *See, e.g.*, Letter from Mary K. Engle, Assoc. Dir., Div. of Advert. Practices, Fed. Trade Comm’n, to Christie Grymes Thompson, Counsel, Cole Haan 1-2 (Mar. 20, 2014) [hereinafter Cole Haan Closing Letter], https://www.ftc.gov/system/files/documents/closing_letters/cole-haan-inc./140320colehaanclosingletter.pdf [<https://perma.cc/ER8W-9H3F>] (noting that the FTC did not pursue enforcement because “the contest ran for a limited time and drew a relatively small number of contestants”); Letter from Mary K. Engle, Assoc. Dir., Div. of Advert. Practices, Fed. Trade Comm’n, to Aaron Hendelman & Lydia Parnes, Counsel, Nordstrom Rack (Feb. 22, 2013) [hereinafter Nordstrom Rack Closing Letter], https://www.ftc.gov/sites/default/files/documents/closing_letters/nordstrom-rack/130222nordstromrackletter.pdf [<https://perma.cc/NF7V-WW2B>] (noting that the FTC did not pursue enforcement because of “the limited nature of the event at issue”); Letter from Mary K. Engle, Assoc. Dir., Div. of Advert. Practices, Fed. Trade Comm’n, to Kenneth A. Plevan, Counsel, AnnTaylor Stores Corp. (Apr. 20, 2010) [hereinafter AnnTaylor Closing Letter], https://www.ftc.gov/sites/default/files/documents/closing_letters/anntaylor-stores-corporation/100420anntaylorclosingletter.pdf [<https://perma.cc/2CHJ-39C2>] (noting that the FTC did not

instances, the endorsements had a limited reach due to the small number of influencers who posted, and some of those influencers did include a disclosure in their posts.²²³ The FTC also considered whether the brand and advertising agency took corrective action as soon as they were aware of the disclosure issue,²²⁴ and whether the brand and advertising agency had implemented a new influencer endorsement disclosure policy that complied with FTC guidance or updated an existing policy to ensure adequate disclosures in the future.²²⁵ Finally, the FTC did not pursue further enforcement action when it had not previously publicly addressed an issue, such as whether a contest entry constituted a material connection and whether a pin on Pinterest constituted an endorsement.²²⁶

In contrast, the FTC has pursued further enforcement action when the influencer campaigns have resulted in significant

pursue enforcement because the event at issue was the first and only such event).

223. *See, e.g.*, Nordstrom Rack Closing Letter, *supra* note 222, at 1 (noting that the FTC did not pursue enforcement because of “the fact that several social media influencers who posted content about the preview did disclose”); Letter from Mary K. Engle, Assoc. Dir., Div. of Advert. Practices, Fed. Trade Comm’n, to John D. Graubert, Counsel, Hewlett-Packard Co., & Amanda P. Reeves, Counsel, Porter Novelli, Inc. 2 (Sept. 27, 2012) [hereinafter HP Inkology Closing Letter], https://www.ftc.gov/sites/default/files/documents/closing_letters/hp-inkology/120927hpinkologycltr.pdf [<https://perma.cc/7F5N-X9KJ>] (noting that the FTC did not pursue enforcement because “a relatively small number of bloggers posted content ... and a few of those bloggers did adequately disclose their material connections”); Hyundai Closing Letter, *supra* note 194, at 1 (noting that the FTC did not pursue enforcement because “a relatively small number of bloggers received the gift certificates, and ... some of them did, in fact, disclose this information”); AnnTaylor Closing Letter, *supra* note 222, at 1 (noting that the FTC did not pursue enforcement because “only a very small number of bloggers posted content about the preview, and several of those bloggers disclosed”).

224. *See, e.g.*, Hyundai Closing Letter, *supra* note 194, at 1 (noting that the FTC decided not to pursue enforcement because “upon learning of the misconduct, the media firm promptly took action to address it”); *supra* note 208 and accompanying text.

225. *See, e.g.*, Nordstrom Rack Closing Letter, *supra* note 222, at 1 (noting that the FTC did not pursue enforcement because of “Nordstrom’s having revised its written social media policies to adequately address [the FTC’s] concerns”); HP Inkology Closing Letter, *supra* note 223, at 2 (noting that the FTC did not pursue enforcement because “both companies have revised their written social media policies to adequately address [the FTC’s] concerns”); Hyundai Closing Letter, *supra* note 194, at 1 (noting that the FTC did not pursue enforcement because “the actions at issue here were contrary both to Hyundai’s established social media policy, which calls for bloggers to disclose their receipt of compensation, and to the policies of the media firm in question”); AnnTaylor Closing Letter, *supra* note 222, at 1 (noting that the FTC did not pursue enforcement because LOFT adopted a written policy following the incident “stating that LOFT will not issue any gift to any blogger without first telling the blogger that the blogger must disclose the gift in his or her blog”).

226. Cole Haan Closing Letter, *supra* note 222.

monetary returns to the brand²²⁷ and when the influencer campaigns have reached several million consumers.²²⁸ The FTC has also pursued enforcement when the contracts with influencers subjected the influencers' posts to pre-approval²²⁹ and when the contracts with influencers did not require disclosures²³⁰ or adequate disclosures.²³¹ The FTC has also pursued further enforcement for "fail[ing] to implement a reasonable monitoring program to ensure that ... affiliates clearly and prominently disclose their relationship [with

227. See, e.g., *Legacy Learning Sys., Inc.*, 151 F.T.C. 383, 386 (2011) (Complaint) (alleging that twenty-five of Legacy's affiliates "are responsible for at least \$5 million in sales").

228. See CGSO Lotto Complaint, *supra* note 212, para. 14 (alleging that "Cassell's videos promoting CGSO Lotto garnered more than 5.7 million views"); Machinima Complaint, *supra* note 203, para. 21 (alleging that Machinima's influencers' videos "generated more than 30 million views"); Press Release, Fed. Trade Comm'n, Warner Bros. Settles FTC Charges It Failed to Adequately Disclose It Paid Online Influencers to Post Gameplay Videos (July 11, 2016), <https://www.ftc.gov/news-events/press-releases/2016/07/warner-bros-settles-ftc-charges-it-failed-adequately-disclose-it> [<https://perma.cc/8C5M-UPF4>] ("Over the course of the campaign, the sponsored videos were viewed more than 5.5 million times."); Press Release, Fed. Trade Comm'n, Lord & Taylor Settles FTC Charges It Deceived Consumers Through Paid Article in an Online Fashion Magazine and Paid Instagram Posts by 50 "Fashion Influencers" (Mar. 15, 2016), <https://www.ftc.gov/news-events/press-releases/2016/03/lord-taylor-settles-ftc-charges-it-deceived-consumers-through> [<https://perma.cc/8HVL-4J8D>] ("In total, the influencers' posts reached 11.4 million individual Instagram users over just two days, led to 328,000 brand engagements with Lord & Taylor's own Instagram handle, and the dress quickly sold out.")

229. See, e.g., Warner Bros. Complaint, *supra* note 203, para. 12 ("By contract, influencers' videos were subject to pre-approval ... to ensure that they conformed with respondent's requirements. On at least one occasion, respondent reviewed and approved an influencer video with an inadequate sponsorship disclosure before it was made public."); Complaint, Lord & Taylor, LLC, F.T.C. Docket No. C-4576, para. 7 (May 20, 2016) [hereinafter Lord & Taylor Complaint], <https://www.ftc.gov/system/files/documents/cases/160523lordtaylorcmt.pdf> [<https://perma.cc/3GXW-86ZV>] (alleging that Lord & Taylor subjected influencer's posts to pre-approval, edited some of the influencers' proposed posts, and did not edit any of the fifty Instagram posts to add a disclosure).

230. See, e.g., Lord & Taylor Complaint, *supra* note 229, para. 6 ("Although Lord & Taylor's Design Lab influencer contracts detailed the manner in which Respondent was to be mentioned in each Instagram posting, the contracts did not require the influencers to disclose in their postings that Respondent had compensated them, nor did Respondent otherwise obligate the influencers to disclose that they had been compensated."); Machinima Complaint, *supra* note 203, paras. 14, 20 ("Respondent did not otherwise oblige the influencers to disclose in their videos that they had been compensated.")

231. See, e.g., Warner Bros. Complaint, *supra* note 203, para. 9 ("Respondent did not require that the YouTube influencers be instructed to place a sponsorship disclosure clearly and conspicuously in the video itself. Nor did respondent require that the YouTube influencers be instructed to place the sponsorship disclosure 'above the fold' in the description box, or visible without consumers having to scroll down or click on a link.")

the brand].”²³² With these enforcement actions, the FTC has signaled its willingness to pursue enforcement for failures to disclose, inadequate disclosures, and failures to monitor influencers when the deceptive advertising practice has a large impact on consumers. These enforcement actions are typically resolved with consent orders.

3. Consent Order Terms

Consent orders are reflective of the FTC’s prophylactic mission and aim to prevent future violations by the same party.²³³ Part I of an order addressing endorsement disclosures typically states, “[R]espondents ... shall not misrepresent, in any manner, expressly or by implication, ... that the ... endorser is an independent user or ordinary consumer of the product or service.”²³⁴ Part II of an order usually states, “[R]espondent ... shall clearly and conspicuously, and in close proximity to the representation, disclose a material connection, if one exists, between such endorser and Respondent.”²³⁵ To accomplish these goals, orders require respondents to educate influencers about disclosures through the signing of a disclosure agreement,²³⁶ make compensation to influencers contingent on

232. See, e.g., *Legacy Learning Sys., Inc.*, 151 F.T.C. at 386 (Complaint) (noting that even though a contract clause required affiliates to “comply with the FTC guidelines on disclosures” it was ineffective without a monitoring program).

233. See 15 U.S.C. § 45(m) (2012) (providing for judicial enforcement of order against the party the order was issued against).

234. *Legacy Learning Sys., Inc.*, 151 F.T.C. at 391 (Decision & Order); see also Decision & Order at 3, Warner Bros. Home Entm’t Inc., F.T.C. Docket No. C-4595 (Nov. 17, 2016) [hereinafter Warner Bros. Order], https://www.ftc.gov/system/files/documents/cases/161811_c-4595_warner_bros_do.pdf [<https://perma.cc/7MU9-5ZQJ>]; Decision and Order at 2, Lord & Taylor, LLC, F.T.C. Docket No. C-4576 (May 20, 2016) [hereinafter Lord & Taylor Order], <https://www.ftc.gov/system/files/documents/cases/160523lordtaylor.pdf> [<https://perma.cc/CXX5-DT3Y>]; Decision and Order at 3, Machinima, Inc., F.T.C. Docket No. C-4569 (Mar. 16, 2016) [hereinafter Machinima Order], <https://www.ftc.gov/system/files/documents/cases/160317machinimado.pdf> [<https://perma.cc/R4Y3-6C9N>].

235. Lord & Taylor Order, *supra* note 234, at 4; see also Warner Bros. Order, *supra* note 234, at 3; Machinima Order, *supra* note 234, at 3; *Legacy Learning Sys., Inc.*, 151 F.T.C. at 391-92 (Decision & Order).

236. See, e.g., Lord & Taylor Order, *supra* note 234, at 4; see also Warner Bros. Order, *supra* note 234, at 4; Machinima Order, *supra* note 234, at 4; *Legacy Learning Sys., Inc.*, 151 F.T.C. at 394 (Decision & Order).

adequate disclosure,²³⁷ and disqualify any noncompliant influencer from an affiliate program or future influencer campaign.²³⁸ Orders also outline monitoring programs tailored to the party's business practices.²³⁹ For example, Legacy's order required Legacy to monitor, on a monthly basis, its "top fifty (50) revenue-generating [a]ffiliates" and "a random sample of fifty [additional affiliates]" to ensure disclosures are clearly and conspicuously made.²⁴⁰ An order may also include a nonpunitive monetary payment to provide redress.²⁴¹ These terms provide a formula for future consent orders as part of a multipronged enforcement approach.

IV. PROPOSAL: A MULTIPRONGED ENFORCEMENT APPROACH

In accordance with the FTC's preventative mission, the FTC should pursue endorsement disclosure enforcement actions against top influencers and large affiliate networks that result in consent orders.²⁴² The FTC should protect its enforcement legitimacy in this area by avoiding enforcement mechanisms that would result in strict liability for a failure to disclose an endorsement.²⁴³ The FTC should also increase its outreach to individual influencers to prevent endorsement disclosure problems with up-and-coming influencers.²⁴⁴

This multipronged enforcement approach maximizes the FTC's limited resources and minimizes harm to consumers by targeting individuals and companies who possess the potential to cause great economic harm by generating purchases through deceptive practices.²⁴⁵ Increased enforcement efforts in this area are critical;

237. See, e.g., Machinima Order, *supra* note 234, at 4; *Legacy Learning Sys., Inc.*, 151 F.T.C. at 394 (Decision & Order).

238. See, e.g., Warner Bros. Order, *supra* note 234, at 4-5; Lord & Taylor Order, *supra* note 234, at 4-5; Machinima Order, *supra* note 234, at 5; *Legacy Learning Sys., Inc.*, 151 F.T.C. at 393 (Decision & Order).

239. Compare *Legacy Learning Sys., Inc.*, 151 F.T.C. at 392-93 (Decision & Order), with Warner Bros. Order, *supra* note 234, at 4-5 (establishing a program requiring Warner Bros. to monitor and review all of their influencers' postings that are part of any future influencer campaign).

240. *Legacy Learning Sys., Inc.*, 151 F.T.C. at 392-93 (Decision & Order).

241. See, e.g., *id.* at 394-95 (requiring a \$250,000 payment for redress).

242. See *supra* Part III.A.

243. See *infra* Part IV.D.

244. See *infra* Part IV.E.

245. See RICHARDS, *supra* note 143, at 17-19.

although consumers can easily evaluate the products for themselves, this is an area that is not experiencing market correction because there is a considerable incentive to misrepresent and not disclose material relationships.²⁴⁶

A. Targeting Top Influencers

The FTC should pursue endorsement disclosure enforcement actions against top influencers. The FTC typically pursues enforcement actions against the least cost avoider: the party that is best situated to avoid similar deceptive acts in the future.²⁴⁷ With regard to proper disclosure of affiliate links, the individual influencer who is sharing the link is the party best situated to ensure adequate disclosures are made on each advertising platform that influencer uses. Further, the FTC has not ruled out enforcement against an individual influencer. It has previously initiated at least one investigation into the endorsement disclosures of an individual influencer and pursued enforcement action against two others.²⁴⁸

April 2017 “marked the first time the [FTC] directly contacted influencers to provide guidance on proper disclosure.”²⁴⁹ Following calls for FTC enforcement action against members of the notorious Kardashian family and other celebrities who have failed to make adequate endorsement disclosures on their Instagram accounts,²⁵⁰ the FTC issued over ninety warning letters to brands and influencers.²⁵¹ These warning letters flagged Instagram posts that

246. See FTC POLICY STATEMENT ON DECEPTION, *supra* note 85; see also *supra* Part I.C.

247. See *supra* Part III.B.1.

248. See *supra* Part III.B.1.

249. C. Ryan Barber, *Who Got Those Social ‘Influencer’ Letters from the FTC? Read the Full List*, NAT’L L. J. (May 5, 2017), <http://www.nationallawjournal.com/id=1202785302263/Who-Got-Those-Social-Influencer-Letters-From-the-FTC-Read-the-Full-List> [<https://perma.cc/K9S3-C87E>].

250. Letter from Pub. Citizen to Jessica L. Rich, Dir., Bureau of Consumer Prot., Fed. Trade Comm’n, & Mary K. Engle, Assoc. Dir., Div. of Advert. Practices, Fed. Trade Comm’n (Sept. 7, 2016), <https://www.citizen.org/sites/default/files/letter-to-ftc-instagram-endorsements.pdf> [<https://perma.cc/49WL-SWD7>]; Letter from Laura Smith, Legal Dir., Truth in Advertising, Inc., & Bonnie Patten, Exec. Dir., Truth in Advertising, Inc., to Jessica L. Rich, Dir., Bureau of Consumer Prot., Fed. Trade Comm’n, & Mary K. Engle, Assoc. Dir., Div. of Advert. Practices, Fed. Trade Comm’n (Aug. 25, 2016), https://www.truthinadvertising.org/wp-content/uploads/2016/08/8_25_16-ltr-from-TINA-to-FTC-re-Kardashian-Jenner-Instagram-posts.pdf [<https://perma.cc/K8RX-22VQ>].

251. Press Release, Fed. Trade Comm’n, *supra* note 195; see also Barber, *supra* note 249.

appeared to endorse a product or service without a proper disclosure.²⁵² In the letters, the FTC reminded influencers and brands that they are subject to the Guides and any material connection must be disclosed clearly and conspicuously.²⁵³ Notably, these letters addressed only endorsement disclosures on Instagram and did not address disclosures on any other media platforms or in connection with affiliate links.²⁵⁴ Nor did these letters indicate that the FTC would take any further enforcement action against the influencers or brands.²⁵⁵

The FTC learned that some of the flagged posts were not paid endorsements but were products the influencer independently decided to promote.²⁵⁶ This further highlights the importance of clear and conspicuous endorsement disclosures.²⁵⁷ These disclosures enable consumers to know that when there is no disclosure there is no material relationship between the influencer and the brand she is promoting.²⁵⁸ Consumers can then make fully informed decisions about how much weight to give to any given endorsement.²⁵⁹

For the brands and influencers who did fail to disclose paid endorsements, the warning letters had a limited impact. At least two brands responded by reviewing their endorsement disclosure policies and implementing the FTC's recommendations for clear and conspicuous disclosures.²⁶⁰ However, a Freedom of Information Act request from *The National Law Journal* "turned up no records of correspondence from any celebrat[y] [influencers] or their representatives [to the FTC]."²⁶¹ From May 1 to June 12, 2017, Public

252. Sample Letter from Fed. Trade Comm'n to Influencer, https://www.ftc.gov/system/files/attachments/press-releases/ftc-staff-reminds-influencers-brands-clearly-disclose-relationship/influencer_template.pdf [<https://perma.cc/7KFK-RDL2>].

253. *Id.*

254. *See id.*; *see also* Press Release, Fed. Trade Comm'n, *supra* note 195.

255. *See* Sample Letter from Fed. Trade Comm'n to Influencer, *supra* note 252.

256. C. Ryan Barber, *How In-House Lawyers Responded to the FTC's 'Influencer' Letters*, NAT'L L.J. (May 26, 2017), <http://www.nationallawjournal.com/id=1202787613698/How-In-House-Lawyers-Responded-to-the-FTCs-Influencer-Letters> [<https://perma.cc/L922-SEYJ>].

257. *See supra* Part I.C.

258. *See supra* Part I.C.

259. *See supra* Part I.C.

260. Barber, *supra* note 256 (detailing Hormel Foods and FabFitFun's responses to the warning letters).

261. *Id.*

Citizen monitored the Instagram accounts of forty-six influencers who received a warning letter from the FTC.²⁶² Public Citizen found,

Of the influencers who posted sponsored content, only one fully and consistently complied with FTC policy. While some users posted advertisements using a disclosure, the same influencers continued to post undisclosed content. In total, 327 (79 percent) of the 412 advertisements posted by the 46 influencers did not comply with FTC standards.²⁶³

In September 2017, the FTC sent follow-up letters to twenty-one influencers who received warning letters.²⁶⁴ Unlike the initial letters, these follow-up letters requested a response from the influencers. The FTC asked influencers to “advise the FTC staff of whether [the influencer] has a material connection with each of the brands or businesses ... endorsed in the[] posts.”²⁶⁵ If the influencer has a material connection with the brand, the FTC asked the influencer to “describe what actions [the influencer is] or will be taking to ensure that” future endorsements are clearly and conspicuously disclosed.²⁶⁶ Although these follow-up letters indicate greater FTC scrutiny of individual influencers’ endorsement disclosures, that scrutiny appears to be limited to a small group of influencers and their posts on Instagram. This scrutiny does not address disclosures in connection with affiliate links.

Although the FTC can, and has, taken limited action against individual influencers, these actions have clearly been insufficient. As one commentator noted, “[The FTC’s] enforcement thus far has proven inconsistent and arguably ineffective, leaving consumers vulnerable to confusion when viewing brands’, celebs’, and influencers’

262. Press Release, Pub. Citizen, Investigation Shows that FTC’s Reminder Letters Are Ineffective at Disclosing Paid Posts on Instagram (June 26, 2017), <https://www.citizen.org/media/press-releases/investigation-shows-ftc%E2%80%99s-reminder-letters-are-ineffective-disclosing-paid-0> [<https://perma.cc/TZ6E-8KPV>].

263. *Id.*

264. See Press Release, Fed. Trade Comm’n, *supra* note 24.

265. Sample Letter from Mary K. Engel, Assoc. Dir., Div. of Advert. Practices, Fed. Trade Comm’n, to Influencer (Sept. 6, 2017), https://www.ftc.gov/system/files/attachments/press-releases/los-propietarios-de-csgo-lotto-resuelven-la-primera-demanda-jamas-entablada-contrainfluyentes-deinstagram_influencer_warning_letter_template_9-6-17.pdf [<https://perma.cc/NFX2-K3N6>].

266. *Id.*

posts.”²⁶⁷ It is essential that the FTC pursue further enforcement action, starting with formal investigations into the endorsement disclosure practice of individual influencers who fail to adequately disclose affiliate links.

To maximize the FTC’s limited enforcement resources, the FTC should pursue enforcement action against only professional influencers who generate a significant amount of revenue from affiliate links and have millions of followers. Government action against these individuals is necessary because for many of these individuals, being an influencer is their full-time job.²⁶⁸ They have a responsibility to know and follow the laws that govern and regulate their industry—which includes adequately disclosing material relationships.

Pursuing selected professional influencers will not only encourage adequate endorsement disclosures among other professional influencers, but will also demonstrate to up-and-coming influencers that making adequate endorsement disclosures is a nonnegotiable element of true success as a professional influencer.

B. Targeting Affiliate Networks

The FTC should also pursue endorsement disclosure enforcement actions against affiliate networks. The FTC has previously pursued enforcement against a brand’s in-house affiliate marketing program whose affiliates failed to disclose or adequately disclose their material relationship with the brand.²⁶⁹ However, both brands and intermediaries are responsible for implementing programs to monitor their influencers’ disclosures and ensure all disclosures are clear and conspicuous.²⁷⁰ Moreover, the FTC typically pursues enforcement actions against the party that is responsible for directing and compensating the influencers because that party is best situated ensure compliance with endorsement disclosure

267. *In Light of Continued Violations, How Effective Were the FTC’s Letters Really?*, FASHION L. (June 7, 2017), <http://www.thefashionlaw.com/home/in-light-of-continued-violations-how-effective-were-the-ftcs-letters-really?rq=How%20Effective%20were%20the%20FTC%27s%20letters%20really%3F> [https://perma.cc/W8PS-2UTD].

268. See Strugatz, *supra* note 10.

269. See *supra* notes 196-202 and accompanying text.

270. See *supra* note 232 and accompanying text.

requirements.²⁷¹ Thus, affiliate networks—which are responsible for recruiting, directing, and compensating influencers—are best situated to monitor influencers for adequate endorsement disclosures.²⁷² Therefore, the FTC should pursue enforcement action against affiliate networks whose influencers fail to disclose or fail to adequately disclose their material relationships.

With complete control of its recruitment of influencers, an affiliate network can make admission to its program contingent on completing an endorsement disclosure training course or signing an endorsement disclosure agreement.²⁷³ As the party that tracks influencer performance and advises influencers on how to maximize profit, the network is best positioned to implement an endorsement disclosure monitoring program and advise influencers on the adequacy of their disclosures.²⁷⁴ The network can incentivize influencer compliance by making compensation contingent on adequate disclosures and expelling noncompliant influencers from the program.²⁷⁵ Additionally, the affiliate network can also add disclosures to embeddable widgets and promotional emails that contain affiliate links.²⁷⁶

C. Pursuing Consent Orders

The FTC has an effective tool for enforcement against influencers and affiliate networks: the consent order. A consent order allows the advertiser to settle deception allegations by entering into a voluntary agreement to discontinue the alleged deceptive practices and take steps to prevent potential future violations.²⁷⁷ Closing investigations into individual influencers and affiliate networks with consent orders is consistent with the FTC's other enforcement actions involving influencers who failed to disclose or adequately disclose

271. *See supra* Part III.B.1.

272. *See supra* Part III.B.1.

273. *See supra* Part III.B.3.

274. *See supra* Part I.B. *But cf.* Mari, *supra* note 57 (noting that rewardStyle provides influencers with “link[s] out to the most updated rules and laws” and places the burden on the influencer to comply with the law).

275. *See supra* Part III.B.3.

276. *See supra* Part I.B.

277. *See supra* Parts III.A, III.B.3.

material relationships.²⁷⁸ Further, consent orders are warranted when the deceptive practice has impacted several million people or generated millions in revenue.²⁷⁹

It is essential for the FTC to pursue consent orders in these cases and demonstrate that adequate endorsement disclosures with affiliate links are nonnegotiable in influencer marketing. This will serve the FTC's prophylactic mission by encouraging other influencers to make adequate endorsement disclosures and other affiliate networks to take steps to ensure their influencers make adequate endorsement disclosures.²⁸⁰ Thus, the FTC can leverage the terms of the consent orders to establish effective endorsement disclosure monitoring systems that set an industry standard, ensuring compliance with FTC endorsement disclosure requirements.²⁸¹

Ending these investigations with closing letters would be inappropriate because these failures to disclose or adequately disclose are not isolated incidents.²⁸² Rather, these professional influencers and affiliate marketing companies reach millions of consumers on a daily basis across multiple advertising platforms, generating millions in revenue.²⁸³ Moreover, this is not a novel issue.²⁸⁴ The FTC has publicly and clearly stated that an affiliate link is an endorsement that requires an adequate disclosure of the material relationship between the blogger and the brand.²⁸⁵

D. Avoiding a Strict Liability Approach

The FTC could pursue a strict liability approach through administrative adjudication or administrative rulemaking.²⁸⁶ However, it would be incredibly challenging for the FTC to prosecute every instance in which an influencer fails to disclose or inadequately

278. *See supra* notes 229-32 and accompanying text.

279. *See supra* notes 227-28 and accompanying text.

280. *See supra* Part III.B.3.

281. *See supra* Part III.B.3.

282. *See supra* Part III.B.2.

283. *See supra* Part I.

284. *See supra* Part III.B.2.

285. *See supra* notes 128-31 and accompanying text.

286. *See supra* notes 168-73 and accompanying text.

discloses a material relationship with an affiliate link.²⁸⁷ A mechanism that cannot be effectively enforced lacks a deterrent effect. If the FTC fails to monitor and subsequently prosecute each and every breach, prosecution of only some breaches becomes more punitive than preventative.²⁸⁸ Accordingly, a strict liability approach to enforcement with respect to influencer endorsement disclosures would jeopardize the legitimacy of the FTC's enforcement power and yield more punitive than preventative results.

E. Increasing FTC Engagement with Individual Influencers

Outreach and engagement with stakeholders are the FTC's most important prophylactic enforcement mechanisms.²⁸⁹ As an initial step, the FTC should raise the profile of the two guidance documents²⁹⁰ it has created to help businesses and individuals apply the Guides to influencer marketing.²⁹¹ The FTC's distribution of these documents should be targeted to top influencers and affiliate networks because they are the least cost avoiders. The FTC should also encourage affiliate networks to disseminate these documents to their influencers.

In its capacity as a convenor, the FTC should hold a public workshop or seminar to bring together influencers and advertisers who can speak to influencer marketing across multiple social media platforms and industries.²⁹² Through these dialogues, the FTC can actively engage with influencers and advertisers to identify areas of confusion with the Guides and opportunities to educate influencers on how to make adequate endorsement disclosures.²⁹³

287. See, e.g., *supra* note 43 and accompanying text.

288. See *supra* notes 83, 143-44 and accompanying text.

289. See *Annual Highlights 2015: Education*, FED. TRADE COMM'N (2015), <https://www.ftc.gov/reports/annual-highlights-2015/education> [<https://perma.cc/4Q32-NKPF>]. For a discussion of how the FTC has effectively used similar outreach measures in the privacy context, see generally Steven Hetcher, *The FTC as Internet Privacy Norm Entrepreneur*, 53 VAND. L. REV. 2041 (2000).

290. The two guidance documents are *.com Disclosures: How to Make Effective Disclosures in Digital Advertising*, FED. TRADE COMM'N, *supra* note 104, and *The FTC's Endorsement Guides: What People Are Asking*, FED. TRADE COMM'N, *supra* note 14.

291. See *supra* note 179 and accompanying text.

292. See *supra* notes 179-82 and accompanying text.

293. See *supra* notes 181-82 and accompanying text.

Through its social media presence, the FTC can directly engage with influencers on their turf. The FTC should actively promote its guidance documents to influencers on its social media channels.²⁹⁴ The FTC should also ensure that it disseminates information through social media about its enforcement activities relating to endorsement disclosures.²⁹⁵ Without effective communication to influencers about the FTC's increased enforcement activities in this area, those actions will have little deterrent effect.

In September 2017, the FTC leveraged its Twitter presence to host a Twitter chat with influencers and informally field questions from influencers about adequate endorsement disclosures.²⁹⁶ Of the twenty-six questions that the FTC addressed, three touched on disclosing affiliate links.²⁹⁷ During the Twitter chat, the FTC reaffirmed that “[w]hen an individual is posting content as an affiliate, he/she is usually an influencer.”²⁹⁸ The FTC also “advise[d] disclosing affiliate relationships.”²⁹⁹ This Twitter chat appears to be a step in the right direction. However, active engagement and communication with influencers requires more than just a one-hour Twitter chat. The FTC should continue to improve its engagement with influencers by following through on its tweet noting that “a part II [m]ay be needed.”³⁰⁰ The FTC can further improve its engagement with influencers by making educational posts about adequate influencer endorsement disclosures part of its regular social media postings.

The FTC should also explore opportunities to engage with the influencer community and encourage voluntary compliance through partnerships with brands, affiliate networks, and professional influencers. A partnership could be as simple as including an FTC presentation on endorsement disclosure requirements at a national

294. See *supra* note 183 and accompanying text.

295. See *supra* note 183 and accompanying text.

296. See Press Release, Fed. Trade Comm'n, *supra* note 186.

297. The author reviewed the FTC's tweets from September 20, 2017, that contained the Twitter chat's hashtag, “#Influencers101.” See FTC (@FTC), TWITTER, <https://twitter.com/FTC> [<https://perma.cc/NA7L-T3P6>].

298. FTC (@FTC), Twitter (Sept. 20, 2017, 1:22 PM), <https://twitter.com/FTC/status/910600067312160773> [<https://perma.cc/74XM-HU8N>].

299. FTC (@FTC), Twitter (Sept. 20, 2017, 1:22 PM), <https://twitter.com/FTC/status/91060004020162561> [<https://perma.cc/4YPW-L8UK>].

300. FTC (@FTC), Twitter (Sept. 20, 2017, 1:51 PM) <https://twitter.com/FTC/status/910607437237014529> [<https://perma.cc/R3KH-5QNS>].

influencer conference.³⁰¹ A partnership could also take the form of collaborating on a blog or social media post with a prominent influencer like Bryan Boy, who strives to be transparent with his followers about his endorsements.³⁰²

Finally, the FTC should also take an assertive approach to outreach by adding affiliate link marketing and influencers to the list of targets during organized surfs.³⁰³ Following the surfs, the FTC can issue warning letters to noncompliant influencers to promote adequate endorsement disclosures.³⁰⁴ The FTC's issuance of warning letters in April 2017 demonstrates that this type of outreach is feasible, yet not completely effective.³⁰⁵ Nevertheless, preventing deceptive endorsements at their inception requires educating professional and amateur influencers about how to adequately disclose material connections with affiliate links.³⁰⁶

CONCLUSION

With the influencer marketing industry growing exponentially, it is critical that the FTC makes it clear to influencers, affiliate networks, and brands alike that disclosure of material connections is nonnegotiable. The FTC's guidance provides ample public notice and opportunity for voluntary compliance with endorsement disclosure requirements.³⁰⁷ Yet, the noncompliance of individual influencers and affiliate networks with affiliate link disclosure requirements continues at an alarming rate and escapes FTC scrutiny.³⁰⁸

301. See *supra* note 179 and accompanying text.

302. Bryan Boy (@bryanboy), TWITTER (May 13, 2017, 7:43 AM), <https://twitter.com/bryanboy/status/863404332502220800> [<https://perma.cc/6L3M-H9HK>] ("Why am I the only one disclosing my travels are subsidized for and or I'm being #sponsored? Why! I mean. This is just ridiculous."); Bryan Boy (@bryanboy), TWITTER (Feb. 5, 2017, 3:15 PM), <https://twitter.com/bryanboy/status/828381582109110276> [<https://perma.cc/3AGH-A62N>] ("I think it's important to own up for what we are. I make a living via paid endorsements.").

303. See *supra* notes 175-76 and accompanying text.

304. See *supra* notes 177-78 and accompanying text.

305. See *supra* Part IV.A.

306. See *UPDATED: Why Does the FTC Keep Ignoring Endorsement Violations?*, FASHION L. (Dec. 15, 2015), <http://www.thefashionlaw.com/home/why-does-the-ftc-keep-ignoring-endorsement-violations?rq=Why%20Does%20the%20FTC%20Keep%20Ignoring%20Endorsement%20Violations> [<https://perma.cc/7RC7-W7LD>] ("The FTC is either not getting its message out in a sufficient manner or [influencers] ... are simply disregarding them.").

307. See *supra* Part II.B.

308. See *supra* Parts I.C, III.B.1.

The proposed multipronged enforcement approach leverages the FTC's enforcement discretion to give greater authority to the existing FTC guidance on endorsements.³⁰⁹ By pursuing enforcement against selected influencers and affiliate networks, the FTC can seek consent orders that set the industry standard for clear and conspicuous disclosures of affiliate links and effective influencer monitoring programs.³¹⁰ This approach maximizes the FTC's limited resources by targeting the least cost avoiders to increase compliance with endorsement disclosure requirements, thus allowing consumers to effectively evaluate influencer endorsements.

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309. *See supra* Part IV.

310. *See supra* Part IV.

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